In the

Supreme Court of the United States

October Term, 1960

No. 256

Joseph W. Di Silvestro,

Petitioner,

—v.—

United States of America,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Congress expressly declared whether a statute or regulation be valid or invalid, or based upon the exercise or perform a discretionary function or duty on the part of a Federal Agency or employee of the Government, "the exercise of due care is 'required'". See: 2680(a) U. S. C. A. 28 3

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Statement

Upon a perusal of the cases relied upon by both the Respondent and the lower courts, this Court's attention is directed to the fact, that in the cases of *Di Silvestro* v. *Gray*, 194 F. 2d 355, certiorari denied, 343 U. S. 930; *Di Silvestro* v. *U. S. Veterans Administration*, 81 F. Supp. 844, affirmed, 173 F. 2d 933 (C. A. 2); *Di Silvestro* v. *U. S. Veterans Administration*, 9 F. R. D. 435; *Di Silvestro* v. *U. S. Veterans Administration*, 10 F. R. D. 20, affirmed, 181 F. 2d 502 (C. A. 2), certiorari denied, 339 U. S. 989; *Di Silvestro* v. *U. S. Veterans Administration*, 132 F. Supp. 692, affirmed, 228 F. 2d 516, certiorari denied, 350 U. S. 1009; *Di Silvestro* v. *U. S. Veterans Administration*, 151 F. Supp. 337, certiorari denied, 355 U. S. 935; the petitioner was precluded from judicial review of *Decisions*

rendered by the Administrator and not of *Acts* of the Administrator working forfeiture of an already adjudicated award to Medical and Hospital Benefits. The petitioner in the above cited cases, did not seek judicial review of Acts of the Administrator forfeiting petitioner's veteran's rights to Medical and Hospital care for *fraud. There was no fraud committed by the petitioner.* See: American Legion's Affidavit in support thereof, on pp. A-8 to A-11 of Petitioner's App.

The case at bar was instituted as the result of Respondent's negligent treatment of petitioner's war service-connected disability, which appears fully in Pet. Brief, pp. 4 to 6. This Court's attention is directed to the fact that the petitioner *for the First Time* is seeking *Judicial Review* of the Administrator's *wrongful act* working a forfeiture of an already adjudicated award of Medical and Hospital benefits, a property right vested to the petitioner for physical and mental damages incurred in the military service in time of war. In support thereof, see: Pet. App. pp. A-3, A-4. The Administrator is prohibited by ruling of this Court, holding that, "*He may not deny a right the statute created.*" *Dismuke* v. *United States*, 297 U. S. 127, 56 S. Ct. 400, 90 L. Ed. 581. It must hold that petitioner's guarantee under the Fifth Amendment of the Constitution has been violated.

Further, it appears on the last paragraph, p. 6 in Respondent's Brief, the Respondent's attorneys are raising a sham defense of libel as an issue, which was assumed by the lower court, appearing in Pet. App. p. A-15. Here the Respondent asserts a right of privilege to disclose to anyone libelous information under the pretext of "being public in nature". There can be no justification of such action, which is offensive and repugnant to "Our Constitution". Information released to Senators Javits and Keating *served no useful purpose.*

POINT I

Congress expressly declared whether a statute or regulation be valid or invalid, or based upon the exercise or perform a discretionary function or duty on the part of a Federal Agency or employee of the Government, "the exercise of due care is 'required' ". See: 2680(a) U. S. C. A. 28.

Therefore, whether section 2680(h) U. S. C. 28 is excluded from the ambit of 1346(b) U. S. C. 28, is immaterial to the issue in the case at bar which is, to wit:

POINT II

Denial of judicial review is in violation of the due process of law under the Fifth Amendment of the Constitution of the United States. See: *Wellman* v. *Whittier*, in Pet. Brief, pp. 15 and 17.

POINT III

Congress has expressly declared that the United States District Court shall have exclusive jurisdiction to hear, determine and render judgment against the United States for money for personal injury caused by negligence. See: Sec. 1346(b) U. S. C. A. 28, and *United States* v. *Brown* in Pet. Brief, pp. 3, 9, and 18.

This is petitioner's legal right notwithstanding any decisions or opinions to the contrary. This guarantee is inviolate to the petitioner under the First Amendment of the Constitution of the United States.

POINT IV

The Administrator of Veterans' Affairs, Board of Veterans' Appeals, and all other officers and employees of the Veterans Administration are not immune from judicial review or excluded from the provisions of Section 1346(b) U. S. C. A. 28.

"Federal Agency" includes the executive department and independent establishments of the United States—

"Employees of the Government" includes officers or employees of any federal agency. (Section 2671 U. S. C. A. 28 as applied to section 1346(b) U. S. C. A. 28) (Federal Tort Claims Act).

It must hold that Respondent's Brief is without merit both in fact and law, and the cases relied upon by both the Respondent and the lower courts are inapplicable.

CONCLUSION

For the above reasons and for the reasons set forth in Brief of Petitioner, it is respectfully submitted that the writ of certiorari and the relief sought for be granted.

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August 1960